Su Yu Min v Ketua Polis Negeri & Ors

HIGH COURT (KUCHING) — JUDICIAL REVIEW NO JR–44 OF 2004–I
CLEMENT SKINNER J
3 JUNE 2005

Constitutional Law — Executive — Delegation of duties by Minister —Whether Deputy Minister had power to issue warrant of arrest and detention or order of restrict residence — Whether subjective function can be delegated — Whether subjective satisfaction subject to judicial review

Constitutional Law — Preventive detention — Restricted residence order — Delay — Calculation of period of delay — Whether delay unreasonable or inordinate — Whether there were breaches of order

The applicant filed an application for judicial review to quash an order of restricted residence dated 21 May 2004 ('the said order') issued against him by the Deputy Minister of Internal Security, Malaysia, pursuant to s 2(ii) of the Restrict Residence Act 1933 ('the RRA'). The applicant also sought a declaration that a warrant of arrest and detention dated 20 March 2004 ('the said warrant of arrest') issued against him by the Deputy Minister of Home Affairs, Malaysia, pursuant to s 2(i) of the RRA, was unlawful, ineffective, null and void. The applicant also sought a similar declaration in respect of the said order of 21 May 2004.

Held, dismissing the application with costs:

(1) In assisting the Minister to discharge his duties and functions the Deputy Minister clearly had all the powers which the Minister had under the RRA including *inter alia*, the full power to sign any warrant of arrest and detention or order of restrict residence under the RRA (see para 16).

(2) By art 43A(2) of the Federal Constitution, the Deputy Minister was already authorised to assist the Minister in the discharge of his duties and functions and for that purpose 'shall have all the powers of the Minister' which, in the context of the RRA, would include the power to issue an order of restricted residence under s 2(ii) of the RRA. When the Deputy Minister did so, it was he and not the Minister who was exercising power under the section, thus it must necessarily follow that it was the Deputy Minister who must comply with the condition precedent to the exercise of that power, ie he must subjectively satisfy himself about the matters mentioned in the section (see para 26).

(3) In cases of preventive detention the court would not question why or how the Minister arrived at his decision nor was the subjective satisfaction of the Minister subject to judicial review (see para 31).

(4) The grounds of restricted residence in this case were within the scope, ambit and purview of the RRA. The grounds stated by the Deputy Minister were reasonable, in that, the applicant operating illegal gambling activities could not be conducive to peace and public order in Kuching City (see para 40).

(5) The first 14 days after the date of the applicant's arrest should not be taken into account when calculating the period of delay because the Deputy Minister must necessarily wait for 14 days to see if the applicant wished to exercise his right to appeal or make representation against his arrest and detention to the Minister. Accordingly the period of delay in the instant case was 22 days. The court of the view that the delay of 22 days to issue the said order of 21 May 2004 was reasonable under the circumstances disclosed and could not be considered as inordinate (see para 55).

(6) Pursuant to s 3(ii) of the RRA, the applicant was required to be taken to his place of restriction 'as soon as may be after action has been taken under sub-s (i). In the circumstances of the case, the lapse of 13 hours to get the procedures and documentation in order before putting the applicant on a flight to Kelantan could not be regarded as a breach of the said order of 21 May 2004 and neither did the placing of the applicant in a police cell and being handcuffed for security reasons as a breach of that order (see para 58).

[**Bahasa Malaysia summary**

Pemohon memfailkan satu permohonan untuk kajian semula untuk bagi membatalkan satu perintah penahanan terhad bertarikh 21 Mei 2004 ('perintah tersebut') yang dikeluarkan terhadapnya oleh Timbalan Menteri Keselamatan Dalam Negeri, Malaysia, di bawah s 2(ii) Akta Kediaman Terhad 1933 ('RRA'). Pemohon juga memohon untuk satu deklarasi bahawa waran tangkapan dan penahanan bertarikh 20 Mac 2004 ('waran tangkapan tersebut') yang dikeluarkan terhadapnya oleh Timbalan Menteri Dalam Negeri, Malaysia, di bawah s 2(i) RRA, tidak sah di sisi undang-undang, tidak berkesan dan terbatal. Pemohon juga memohon deklarasi yang serupa berhubung dengan perintah bertarikh 21 Mei 2004 itu.

Diputuskan, menolak permohonan dengan kos:

(1) Dalam membantu Menteri melaksanakan tugas-tugas dan tanggungjawabnya, Timbalan Menteri jelas mempunyai semua kuasa yang dimiliki oleh Menteri di bawah RRA termasuk *inter alia*, kuasa penuh untuk menandatangani sebarang waran tangkapan dan penahanan atau perintah penahanan terhad di bawah RRA (lihat perenggan 16).

(2) Di bawah per 43A(2) Perlembagaan Persekutuan, Timbalan Menteri telah diberi kuasa untuk membantu Menteri dalam melaksanakan tugas dan tanggungjawabnya dan untuk tujuan tersebut 'mempunyai semua kuasa-kuasa Menteri' yang mana dalam konteks RRA, termasuklah kuasa mengeluarkan perintah penahanan terhad di bawah s 2(ii) RRA. Apabila Timbalan Menteri berbuat demikian, ianya beliau dan bukannya Menteri yang menggunapakai kuasa di bawah seksyen tersebut, maka dari itu ianya Timbalan Menteri yang mesti mematuhi prasyarat dalam menggunapakai kuasa tersebut iaitu beliau hendaklah secara subjektif memuaskan dirinya

berhubung dengan perkara yang dinyatakan di dalam seksyen tersebut (lihat perenggan 26).

(3) Dalam kes-kes penahanan preventif mahkamah tidak akan menyoal kenapa atau bagaimana Menteri mencapai keputusannya ataupun membuat kajian semula ke atas kepuasan subjektif Menteri (lihat perenggan 31).

(4) Alasan-alasan penahanan terhad di dalam kes ini adalah di dalam skop dan lingkungan RRA. Alasan-alasan yang dinyatakan oleh Timbalan Menteri adalah munasabah iaitu kegiatan perjudian haram pemohon adalah tidak kondusif untuk keamanan dan ketenteraman awam di Bandar Kuching (lihat perenggan 40).

(5) Empat belas hari pertama selepas penahanan pemohon tidak boleh diambil kira dalam mengira tempoh kelewatan kerana Timbalan Menteri mesti menunggu selama 14 hari untuk melihat sama ada pemohon berniat untuk merayu atau membuat representasi terhadap tangkapan dan penahanannya kepada Menteri. Dari itu tempoh kelewatan dalam kes semasa adalah 22 hari. Mahkamah berpendapat bahawa kelewatan 22 hari untuk mengeluarkan perintah bertarikh 21 Mei 2004 adalah munasabah di dalam keadaan-keadaan kes ini dan ianya tidak boleh dikatakan terlampau (lihat perenggan 55).

(6) Menurut s 3(ii) RRA, pemohon dikehendaki dibawa ke tempat penahanannya 'secepat mungkin' selepas tindakan diambil di bawah sub-s (i). Dalam keadaan-keadaan kes ini, jurang masa 13 jam untuk memenuhi prosedur-prosedur dan memproses dokumentasi sebelum dapat menerbangkan pemohon ke Kelantan tidak boleh dianggap sebagai pengingkaran perintah bertarikh 21 Mei 2004 tersebut dan begitu juga, meletakkan pemohon di dalam sel polis dan menggari pemohon atas sebab keselamatan bukanlah satu pengingkaran perintah tersebut (see para 58).]

Notes

For a case on delegation of duties by Minister, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1734.

For a case on restricted residence order, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1986.

Cases referred to

Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v Chua Teck [1990] 1 CLJ Rep 179 (refd)

Ng Chai Yang v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia [1994] 2 MLJ 336 (refd)

Phua Heng Lai & Ors v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors [1990] 1 CLJ (Rep) 238 (refd)

The Minister of Home Affairs Malaysia & Anor v Karpal Singh [1988] 3 MLJ 29 (refd)

Thor Kheng Chai v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia [1994] MLJU 457 (refd)

Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v Cheaw Siong Chin [1988] 1 MLJ 432 (refd)

Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia v Liau Nyun Fui [1991] 1 MLJ 350 (refd)
Zakaria bin Hussain v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors [1994] MLJU 39 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25(2)
Federal Constitution arts 5(4), 8(1), 9(2), 43A(2), 149, 11th Schedule s 3
Internal Security Act 1960
Interpretation Act 1948 s 54(2)
Ministerial Functions Act 1969 s 2
Prison Regulation 2000 reg 233
Restrict Residence Act 1933 ss 2(ii), 3(ii)
Rules of the High Court 1980 O 53

Voon Lee Shan (Voon & Co) for the applicant.
Fazillah Begum (State Legal Advisor) (Ministry of Internal Security) for the respondent.

Clement Skinner J:

[1] This is the hearing of an application for judicial review by Mr Su Yu Min (hereafter 'the applicant') to quash an order of restricted residence dated 21 May 2004 (hereafter 'the said order') issued against him by the Deputy Minister of Internal Security, Malaysia, pursuant to s 2(ii) of the Restrict Residence Act 1933 (hereafter 'the RRA') requiring him to reside for two years within the Mukim of Bachok, Jajahan Bachok, Kelantan. The applicant also sought a declaration that a warrant of arrest and detention dated 20 March 2004 (hereafter 'the said warrant of arrest') issued against him by the Deputy Minister of Home Affairs, Malaysia, pursuant to s 2(i) of the RRA, is unlawful, ineffective, null and void. The applicant sought a similar declaration in respect of the said order of 21 May 2004.

[2] The brief facts leading to this application are these.

[3] The applicant is a businessman with interest in at least three companies and resides at No 235 Padungan Road, Kuching, Sarawak. On 15 April 2004 while the applicant was at one of his places of business at 89 Ewe Hai Street, Kuching he was arrested by a police party pursuant to the said warrant of arrest issued by the Deputy Minister of Home Affairs who was then Dato' Zainal Abidin bin Zin. The reasons given by the Deputy Minister for the applicant's arrest and detention were that his (the applicant's) activities were not beneficial or conducive to the maintenance of peace and public order in the vicinity of Kuching, in that, it was alleged that the applicant had since 1996 actively engaged in operating an illegal four-digit lottery.

[4] After his arrest the applicant was brought to the Central Police Station, Kuching after which he was taken to the Sarawak Prison, Kuching to await the further orders of the Deputy Minister, as directed in the said warrant of arrest.

[5] While being detained at Kuching prison the applicant was visited by his wife as well as by his lawyer, the latter on at least three occasions on 19 April 2004, 24 April 2004 and 26 April 2004.

[6] Then on 27 April 2004 the applicant filed a motion applying for a writ of habeas corpus to be issued for his release from detention.

[7] The habeas corpus application came up for hearing on 21 May 2004 but on that very same day the applicant was served with the said order issued by the Deputy Minister of Internal Security, namely, Dato' Noh bin Hj Omar. Certain terms and conditions were imposed on the applicant during his restriction to Bachok. It will not be necessary for the purpose of this decision to set out what all those conditions were apart from stating a few, such as, that the applicant was not to leave Bachok without the written permission of the Chief Police Officer of Kelantan; that in the first year of residence the applicant was required to report to the police station on every Monday and Thursday of the week; but from the second year onwards, he was required to do so only on each Monday of the week.

[8] Given the fact that on his being served with the said order, the applicant could no longer be regarded as a person under detention, the applicant withdrew his habeas corpus application at the hearing. It was accordingly struck out.

[9] On 18 June 2004 the applicant applied for leave to apply for judicial review and on being granted such leave filed this application. Hence this hearing.

[10] The applicant relies on several grounds to obtain the relief he seeks. Before I address each of them I must deal with several objections taken against the application by counsel for the respondents. She complained that the intitulement of the application is not clear. I do not agree. The intitulment sufficiently states the particular rule of court and provisions of written law under which the court is being moved, namely, O 53 Rules of the High Court 1980 ('the RHC') and s 25(2) of the Courts of Judicature Act 1964, which empowers the court to exercise those additional powers mentioned in the schedule ie to grant orders of certioraris etc. Counsel for the respondents says that the schedule which is referred to in s 25(2) of the Courts of Judicature Act 1964 contains 17 sections, so the court should not be left guessing which section the applicant relies on. It is quite plain for me to see that the additional power which the court is being requested to exercise by this application is that power to grant relief by way of *certiorari* under s 1 of the schedule.

[11] Counsel for the respondent also complained that while the applicant had set out in his motion the grounds upon which he relies for the relief he seeks, these grounds are not alleged in any of the affidavits sworn in support of the motion. I see no merit in this complaint. Order 53 RHC requires the application to be supported by a statement in which is set out the name and description of the applicant, the relief sought and the grounds on which it is sought, while the affidavit serves to verify the facts relied on. A fair reading of the applicant's and his wife's affidavit do fulfil that purpose, in that, they

set out the circumstances and facts surrounding or relating to his arrest, detention and subsequent transportation to Bachok, Kelantan. Accordingly, I do not find the affidavits filed in support of this application to be in any way lacking as alleged by the respondents.

[12] It was also contended that the applicant should be estopped from bringing this application for judicial review as he had withdrawn his earlier application for *habeas corpus* and was not given liberty to apply to the court. I see nothing in the point taken. Since the applicant's *habeas corpus* application was withdrawn and never considered or heard on its merits nor was there any adjudication on it, I do not see how the equitable doctrine of estoppel would operate against the applicant here. For the same reason the applicant does not need to be given liberty to make this application.

[13] With that I move on to address each of the applicant's grounds.

DEPUTY MINISTER HAD NO POWER

[14] The applicant contended that the warrant of arrest which was issued by the then Deputy Minister of Home Affairs, Malaysia was defective, void or bad in law because the person who is authorised to exercise the powers mentioned in the RRA is the 'Minister'. According to counsel, since the RRA 'does not give any power to a Deputy Minister', the warrant of arrest which was signed by the Deputy Minister in this case must be void. I do not agree. In my judgment when a Deputy Minister exercises power under any particular enactment he need not necessarily be conferred the right to do so by that enactment itself. It can also be conferred by other laws. In this instance the Federal Constitution is that law. Article 43A(2) states:

> Deputy Ministers shall assist Ministers in the discharge of their duties and functions and for such purpose shall have all the powers of Ministers.

[15] This article has been in force since 16 December 1983 and should be read together with s 30 of the 11th Schedule to the Federal Constitution which relates to the construction of enabling words and reads:

> Construction of enabling words
>
> Where a written law confers power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

[16] The provisions of law on the powers which a Deputy Minister may exercise are so clear that they do not require interpretation. Reverting to the facts of this case, in assisting the Minister to discharge his duties and functions the Deputy Minister clearly had all the powers which the Minister had under the RRA including, *inter alia*, the full power to sign any warrant of arrest and detention or order of restrict residence under the RRA.

DEPUTY MINISTER NOT ALLOCATED DUTY

[17] Counsel for the applicant next contended that even if a Deputy Minister can exercise the powers which a Minister has under the RRA, a Minister or Deputy Minister can only perform those functions or duties that are allocated to him and gazetted under s 2 of the Ministerial Functions Act 1969. According to the counsel, when Dato' Zainal Abdidin bin Zin signed the said warrant of arrest on 20 March 2004, there was in place such an allocation of functions and duties embodied in an order known as The Ministers of the Federal Government Order 2000 published in the Gazette as PU(A) 35. According to counsel for the applicant, if that order is looked at it does not state that Dato' Zainal Abidin bin Zin had 'been gazetted by the Yang Di-Pertuan Agong to perform the duty and function in respect of persons under restricted residence'.

[18] This is how the gazette PU(A) 35 reads in its material parts.

Schedule

Ministers of the Federal Government and their functions

Persons	Styles	Departments	Subjects
Dato Seri Abdullah bin Haji Ahmad Badawi	Minister of Home Affairs	Ministry of Home Affairs	Public order and internal security
Dato Chor Chee Heng	Deputy Minister of Home Affairs		Border security
Dato' Zainal Abidin bin Zin	Deputy Minister of Home Affairs		Licensing of private agencies
			Control of firearm and explosives
			Banishment
			Ex police personnel affairs
			People volunteer Corp (RELA)

			Film censorship
			Control of publications
			Rehabilitation centres
			Dentention
		Civil Defence Department	Civil defence
		Percetakan Nasional Berhad	Government Printing
		National Narcotics Agency	Coordination of Anti-Drug measures
			Treatment and rehabilitation of drug dependents

[19] Counsel for the applicant took the same point in respect of the said order dated 21 May 2004, signed by Dato' Noh bin Haji Omar as Deputy Minister of Internal Security Malaysia, but in this instance it is the contention of the applicant that it was only En Chia Kwang Chye as the Deputy Minister of Internal Security Malaysia, who had the power to issue the said order because at that material date, the functions of Ministers and Deputy Ministers under the Ministerial Functions Act 1969 was allocated according to an order known as the Ministers of the Federal Government (No 2) Order 2004, published in the gazette as PU(A) 206 which in its material parts reads as follows:

Schedule

Ministers of the Federal Government and their functions

Persons	Styles	Departments	Subjects
Dato Seri Abdullah bin Haji Ahmad Badawi	Minister of Internal Security	Ministry of Internal Security	Formulates and implements policy on security and public order

Dato Noh bin Omar	Deputy Minister of Internal Security		Responsible for the preservation and maintenance and order, harmony and internal security
En Chia Kwang Chye	Deputy Minister of Internal Security		Performs functions and exercises powers under the: Internal Security Act 1960 Dangerous Drugs (Special Preventive Measures) Act 1985 Emergency (Essential Powers) Act 1964 Emergency (Essential Powers) Act 1979 Restricted Residence Act 1933 Extradition Act 1992 Prevention of Crime Act 1959 Anti Money Laundering Act 2001 Printing Presses and Publications Act 1984 Printing of Qur'anic Texts Act 1986
		Royal Malaysia Police Department (PDRM)	Carries out functions and responsibility according to the Police Act 1967 and other powers given to the police
		Prison Department	Performs functions under the Prison Act 1995
		Public Defence Department	Performs functions under the Civil Defence Act 1951
		National Drug Agency	Performs functions under the Civil Defence Act 1951
		Percetakan Nasional Malaysia Bhd	Government printing

[20] Referring first to PU(A) 206 counsel for the applicant took two points. He first said that since the Restricted Residence Act 1933 is a subject matter appearing beside the name of En Chia Kwang Chye and not that of Dato' Noh bin Omar, the latter had no power to sign the said order. Secondly, counsel said that since 'only En Chia Kwang Chye had been gazetted to perform the functions of the Minister in respect of the Restrict Residence Act 1933', it was only Dato' Chia and not Dato' Noh bin Omar who could sign the said order. I do not agree. With respect, I find the contention totally untenable. I say so for the following reasons. Any interpretation of the Schedule to the Ministers of Federal Government Order 2000 (ie PU(A) 35) and the Ministers of Federal Government (No 2) Order 2004 (ie PU(A) 206) cannot be made in ignorance of the provisions appearing in the respective orders themselves. In particular, the Schedule must be read subject to what is stated in s 2 of each Order which expressly deals with how the Schedule and the various columns appearing in them are to be read. Section 2 reads:

Ministerial Functions

2(1) It is notified that the persons named in the first column of the Schedule shall have the styles and titles of office specified in the second column corresponding to their respective names in the Schedule.

2(2) the person whose name is mentioned *first* in the *first column* of the Schedule in relation to any department or subject specified in the third and fourth columns corresponding to *his name* shall be *the person* charged with the responsibility for that department or subject and shall be assisted by the persons whose names appear underneath that *first mentioned person's* name in the first column. (Emphasis added.)

[21] What this means is that since Dato' Seri Abdullah bin Haji Ahmad Badawi is the person whose name is mentioned 'first in the first column' of the schedule, it is he who shall be 'the person' charged with the responsibility for any department or subject specified in the third and fourth columns corresponding to 'his name' ie Dato' Seri Abdullah bin Haji Ahmad Badawi's name, as the Minister of Internal Security and not to any other person as suggested by counsel for the applicant. Section 2(2) makes it clear that the names of Dato' Zainal Abidin bin Zin or Dato' Cho Chee Heung or Dato' Noh bin Omar or En Chia Kwang Chye, being the 'persons' whose names appear 'underneath' that of Dato' Seri Abdullah bin Haji Ahmad Badawi's name in the first column, are the persons who assist him in his responsibilities and functions.

[22] Therefore, it must follow that since Dato' Seri Abdullah bin Haji Ahmad Badawi, as Minister of Home Affairs/Minister of Internal Security, Malaysia was responsible for public order and internal security as well as exercising functions and powers under the Restricted Residence Act in PU(A) 35 and PU(A) 206 respectively, each of the Deputy Ministers mentioned below his name in these two orders were authorised to assist him, and being authorised to assist the Minister they each had all the powers of the Minister (art 43A(2)).

[23] I pause here to mention that I am aware that the text on s 2 in PU(A) 35 and s 2 of PU(A) 206 are not exactly the same, but in substance and in effect they are the same.

[24] It must also follow from what I say that counsel for the applicant cannot be correct when he said that since only 'En Chia Kwang Chy has been gazetted to perform the functions of the functions of the Minister in respect of the Restrict Residence Act 1933', only he and not Dato' Noh bin Omar could sign the said order of 21 May 2004. The other flaw in counsel's argument is that it was never gazetted that En Chia Kwang Chye shall perform the functions of the Minister in respect of the RRA as alleged. What was gazetted was the Ministers of the Federal Government (No 2) Order 2004, and from s 2 of that Order it is clear that both Dato' Noh bin Omar and En Chia Kwang Chye shall assist the Minister in discharging his responsibilities under the RRA.

SUBJECTIVE BELIEF OF MINISTER

[25] It was next contended by counsel for the appellant that even if the Deputy Minister was empowered to exercise the powers of the Minister under the RRA, it was a conditional precedent to any exercise of power by the Minister that he must hold a subjective belief that there are reasonable grounds for believing that the applicant should reside in any particular area. It is the contention of counsel that the Minister could not delegate this function to the Deputy Minister since that function involved an abstract process ie of thinking which, according to counsel, could only be dealt of the Minister himself. So counsel submitted that while it may be possible for the Minister to delegate those physical aspects of his functions such as the signing of documents, etc. he could not allow the thinking process to be performed by others.

[26] I do not agree. The notion that the Minister 'delegates' his functions under the RRA to the Deputy Minister is a fallacy. By art 43A(2) of the Federal Constitution, the Deputy Minister is already authorised to assist the Minister in the discharge of his duties and functions and for that purpose 'shall have all the powers of the Minister' which, in the context of the RRA, would include the power to issue an order of restricted residence under s 2(ii) of the RRA. Where the Deputy Minister does so, then since it is he and not the Minister who is exercising power under the section, it must necessarily follow that it is the Deputy Minister who must comply with the condition precedent to the exercise of that power ie he must subjectively satisfy himself about the matters mentioned in the section, which is exactly what the Deputy Minister did in this case.

MALAFIDES

[27] The applicant next complained that the said warrant of arrest dated 20 March 2004 was issued mechanically, fraudulently and in bad faith by the Deputy Minister as it was 'pre-signed'. According to the applicant, it was pre-signed and issued fraudulently as the 20 March 2004 fell on a third Saturday

of the month when the Deputy Minister, his agents and officers were not at work since it was not a normal working day for government officers.

[28] This is a wild and unsubstantiated allegation by the applicant. It is wrong to assume that just because every third Saturday is a non-working day for government servants, the Deputy Minister and his officers did not perform their duties and functions that day. The applicant has not offered any evidence to substantiate his allegation. As opposed to that, the Deputy Minister, Dato' Zainal Abidin bin Zin as well as his officer, Mohd Russaini bin Idrus have affirmed in their affidavits of 4 October 2004 and 22 September 2004 respectively that on 20 March 2004 the documents and case file concerning the applicant were taken to the Deputy Minister by Mohd Russaini, who was the Assistant Secretary 'Al' of the Security and Public Order Division of the then Ministry of Home Affairs. The Deputy Minister states in his affidavit that it was only after he had examined and evaluated the related documents and the case file that he was satisfied that there were reasonable grounds to believe that the activities of the applicant were not conducive to the peace and public order of Kuching City. So, he issued the said warrant of arrest against the applicant.

[29] With regard to complaint that the said order was signed mechanically by the Deputy Minister of Internal Security Malaysia, I find no substance in this allegation. In his affidavit of 4 October 2004, Dato' Noh bin Omar affirmed that before he issued the said order in respect of the applicant, he had directed his mind to the documents and case file and had carefully scrutinised the documents and case relating to the activities of the applicant and was satisfied that there were reasonable grounds to require the applicant to reside at Mukim Bachok, Jajahan Bachok, Kelantan. There is accordingly no basis for the applicant's allegations.

INSUFFICIENT GROUNDS

[30] The applicant next complained that his arrest and detention was based on insufficient or vague grounds. I do not agree. The said warrant of arrest has annexed to it Form B which states distinctly that the applicant has since 1996 until now actively involved himself in operating an illegal four-digit lottery within Kuching City and even identifies the premises from which these illegal activities were conducted from. I do not find what was stated in Form B to be insufficient or vague.

NON-DISCLOSURE OF FACTS

[31] The applicant also complained that the Deputy Minister did not disclose what facts and allegations he had acted on in arriving at his decision that the activities of the applicant were detrimental to peace and public order in Kuching City, so as to warrant his arrest and detention. I do not regard this as a valid complaint. The court should be astute enough to see that what the applicant is attempting to do here by demanding for such disclosure is to

indirectly achieve what it cannot achieve directly, namely, to subject the subjective satisfaction of the Deputy Minister to judicial review. It is well accepted that in cases of preventive detention the court will not question why or how the Minister arrived at his decision nor is the subjective satisfaction of the Minister subject to judicial review for the reason that the RRA expressly empowers the Minister to make an Order upon a subjective condition, that is, a particular state of his mind, such as, for example, 'Whenever it shall appear to the Minister', or that 'there are reasonable grounds for believing' and once the Minister says he is so satisfied, his subjective satisfaction is not subject to judicial review. In support of what I say, I refer to *The Minister of Home Affairs Malaysia & Anor v Karpal Singh* [1988] 3 MLJ 29, the head note of which reads:

Held:

(2) Whether there is reasonable cause for the making of the detention order is something which exists solely in the mind of the Minister of Home Affairs and he alone can decide it and it is not subject to challenge or judicial review unless it can be shown that he did not hold the opinion which he profess to hold.

(3) The subjective satisfaction of the Minister of Home Affairs is not subject to judicial review.

[32] I also refer to *Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v Chua Teck* [1990] 1 CLJ Rep 179 where it was held (quoting from the headnotes):

(1) Before the Minister makes an order for the extension of thedetention order on the same grounds as the original detention order as in s11A(1), the Minister need only be satisfied on the same ground on which the original detention order was made.

(2) …

(3) It is not open for the court to question how or why the Minister is satisfied, so long as the Minister says that he is satisfied after considering all the information available to him that thedetention should be extended.

[33] I am quite aware that the facts in the above two cases are different from the facts of this case and that both those cases were decided under the Internal Security Act 1960, but I refer to them for the principal stated in them because when the Minister is exercising power under that Act he is also required to make his order upon a subjective condition of his mind. By analogy, if the court will not subject the Minister's subjective satisfaction to judicial review when he is acting under the Internal Security Act 1960, I do not see why it should do so where the Minister's subjective satisfaction happens to be formed under the RRA.

INNOCUOUS ACTIVITY

[34] The applicant also complained that the said warrant of arrest should have never been issued against him in the first place as it could not be said

that operating an illegal four-digit lottery was an activity which affected peace and public order. According to the applicant, at most, it only amounted to evading duties or taxes by doing business without a licence; no different, said counsel, from say operating a coffee shop without a licence. And according to counsel for the applicant, no right thinking person would regard the operation of an unlicensed coffee shop as an activity affecting peace and public order. This submission must be given short shrift. I must be excused for saying that I find the applicant's attempt to equate or liken the running of an illegal four-digit lottery with that of operating an unlicensed coffee shop a little bizarre and over simplistic. Although both offend against licensing laws, that is where the similarity ends. There is a vast difference between serving coffee at an unlicensed coffee shop and organising illegal gambling, which is what the game of four-digit is a form of. Public gaming has always been subjected to very strict control as gambling is an activity which affects every strata of society, from the affluent to those who can ill afford to participate in it. It is not difficult to me why if left unchecked, illegal public gaming can constitute a threat to peace and public order. Money which should be spent on wholesome needs such as family support and educating the young is instead diverted to gambling, with devastating effects on the family leading eventually to the breakdown of the family unit, which in turn leads to social ills and problems giving rise in turn to public law and order issues.

ABUSE OF POWER

[35] The applicant also complained that the RRA is ambiguous as it does not state under what circumstances, or upon what acts or omissions the Minister can act in issuing orders under it, and that the Deputy Minister had abused the RRA by using its provisions to arrest and detain him for operating an illegal four-digit lottery, instead of charging him in court if he had committed any offence.

[36] I do not agree. Counsel's allegation of ambiguity in the RRA are unfounded. With all respect it is my view that counsel has failed to appreciate the true scope of the RRA. The preamble to the Act states that it is an Act relating to the making and enforcement or orders regarding residence in and exclusion from certain areas. Human conduct is so varied and unpredictable that it would be impractical and, in my view, unwise to try to prescribe the circumstances, acts or omissions upon which the Minister may act, as suggested by the applicant. That is why, having given the power to the Minister to make the orders mentioned, and so as not to unduly restrict its efficiency, s 2 of the RRA leaves it to the subjective satisfaction of the Minister whether a person is to be restricted or banished from a certain area. And in satisfying himself that there are reasonable grounds for doing so, the section does not require or restrict the Minister to only doing so if an offence has been committed for which a person may or may not be charged in court.

CONSTITUTIONAL PROTECTION

[37] It was next said by the applicant that his alleged activities of operating an illegal four-digit lottery was not a matter which the Deputy Minister could rely on to exercising his powers under the RRA as such an activity is not caught by art 149 of the Federal Constitution. Accordingly it is the applicant's case that the Deputy Minister had acted on irrelevant considerations when he made the two orders against him and that he was entitled to the protection of arts 5(4), 8(1) and 9(2) of the Federal Constitution, to have the orders revoked. Article 149 reads:

> Legislation against subversion, action prejudicial to public order, etc.
>
> (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation:
>
> (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
>
> (b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
>
> (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or
>
> (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
>
> (e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
>
> (f) which is prejudicial to public order in, or the security of, the Federation or any part thereof
>
> any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of art 5, 9, 10 or 13, or would apart from this article be outside the legislative power of Parliament; and art 79 shall not apply to a Bill or such an Act or any amendment to such a Bill.
>
> (2) …

[38] I find this argument misconceived. A reading of the RRA shows that it was not promulgated under art 149 and so it is idle for the applicant to try to argue that he can only be dealt with under the RRA if his activities are those proscribed by art 149. As I said before, the applicant can be dealt with by the Minister under the RRA if the Minister is satisfied that there are reasonable grounds for believing that he should be restricted to or banished from a certain place. In this regard, I refer to what was said by the Supreme Court in *Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v Cheaw Siong Chin* [1988] 1 MLJ 432 where the issue of whether the grounds of detention came within the Restricted Residence Enactment was raised in the cross-appeal. This is what the Supreme Court (per Abdul Hamid CJ) said about the validity and scope of the enactment (at p 432):

The Enactment is pre-Merdeka law but it was settled in *Assa Singh v Menteri Besar, Johore* [1969] 2 MLJ 30, that the Enactment is valid but must be read with such modifications as may be necessary to bring it into accord with the provisions of the Constitution in accordance with art 162(6) of the Constitution. The Enactment empowers the executive to exile any person to any part of the Federation.

[39] Later on, at p 434 of his judgment, this is what the learned Chief Justice Malaya said about the scope of the enactment:

> As regards to the cross-appeal, it is to be observed that the object of the Enactment is to maintain public order. The Enactment is a pre-Merdeka law which has proved its usefulness. On the point raised the learned judge said in this judgment:
>
> > The Enactment indeed gives drastic powers to the executive to exile any person who wears a grey tie because the executive does not like him to wear a grey tie. It was, however, argued that as the allegation against the plaintiff is that of cheating under the Penal Code, he should be prosecuted in the criminal court and therefore the Enactment should not be used against him. It is not for the court to fathom the thought of the Minister. The enactment gives him the power to restrict the plaintiff because the ground stated is reasonable, that is to say a cheat should not be allowed to cheat innocent people. The Minister had stated that the order was made because the plaintiff wore a grey tie. I accordingly hold that the grounds of restricted residence in the instant case are within the scope, ambit, and purview of the enactment.
>
> With respect, we agree and accordingly dismissed the cross-appeal.

[40] Applying the reasoning of the Supreme Court in the above case to the facts before me, I find that the grounds stated by the Deputy Minister are reasonable, in that, the applicant operating illegal gambling activities cannot be conducive to peace and public order in Kuching City. I accordingly hold that the grounds of restricted residence in this case are within the scope, ambit and purview of the RRA.

GROUNDS OF ARREST AND DETENTION NOT EXPLAINED

[41] The applicant next complained that when he was arrested and detained, the grounds upon which the Deputy Minister had done so and the contents of Borang A and B were not explained to him in English, a language in which he was proficient and had demanded to be used. Instead, according to the applicant, the contents of the documents were translated to him in Mandarin, which he was not very conversant in. As such the applicant complains he did not know all the terms of the orders made against him or of his right to appeal or make representations. This is denied by the respondents. The arresting officer Chief Inspector Sepit Ak Dundang and Lance Corporal Chua Ming Key have sworn affidavits to the effect that on his arrest, the applicant was informed by Chief Inspector Sept in the Malay language the grounds of his arrest as stated in Form A and Form B, and of his right to appeal to the Minister

in 14 days. What was said to the applicant in Malay was also translated to him in Mandarin by Lance Corporal Chua Ming Key.

[42] I have no hesitation in rejecting the applicant's complaint that he did not know the grounds for his arrest and detention. Despite the applicant's denial that he did not know what was being explained to him, I am not obliged to accept uncritically his assertion. I find it difficult to believe that at this day and age the applicant, who is a businessman and educated to Form 6 level, does not understand what is being read to him in Malay. Further, it is quite evident from what the applicant says in his affidavit that he in fact understands Mandarin but he does so 'poorly'. Although this is a vague and equivocal statement, it nevertheless shows that he understands Mandarin. Ifthe applicant did not understand what was being said to him in Mandarin and he was not able to communicate in it, then I find it surprising that the applicant can give an account of what he told Chief Inspector Dundang about wanting a transcript in English, of his request to be provided with a lawyer and being refused both for the reasons given by him. Further, how is the applicant able to say in para 14 of his affidavit that before he signed Form A, he was told that his signature was only to acknowledge receipt of the warrant and the annexure that had been served o n him and also that the contents has been read and translated to him? Looking at what the applicant has said in his affidavit as a whole and his account of what happened on his arrest, I am satisfied that the applicant did understand the grounds of which he was arrested and detained. I have no reason to disbelieve what Chief Inspector Sepit and Lance Corporal Chua Ming Key have said on the matter. Counsel for the applicant had questioned why, if the applicant understood what was said to him in Malay and Mandarin, was there a necessity to do so in two languages? I see nothing wrong in doing so to make sure that the applicant understood what was being explained to him.

CONDITIONS OF RESTRICTED RESIDENCE NOT EXPLAINED

[43] The applicant next complained that he was not informed fully of the contents of the said Order of 21 May 2004 ie of the conditions of restricted residence stated in Forms C and E when they were served to him. I see nothing in the point taken. It is interesting to note that the applicant acknowledges in para 30 and 31 of his affidavit that while some of the contents and important points of Form C and E were made known to him, not all of their contents were made known. This is of course denied by deputy superintendent of prison Mohd Andri bin Md Ridzwan who says he informed the applicant the contents of Form C and E in simple Malay and the applicant acknowledged that he understood the Malay language and what he was being informed of. I do not see any reason to disbelieve Mohd Andri. He was performing an official duty in which he had no personal interest. On the other hand, the applicant here is trying to secure his release from restrict residence and it appears that he is not averse at putting a slant on things to suit his case. I do not see why, if Mohd Andri undertook the task of informing the applicant about the contents

in Form C and E, he should want to withhold information on a part of it as alleged by the applicant. It serves no purpose for him to do so.

RIGHT TO BE HEARD

[44] The applicant also complained that the failure to accord him a hearing before the order of restricted residence was issued against him by the Deputy Minister of Internal Security Malaysia was unconstitutional as it did not accord with his right under art 5 of the Constitution. I do not agree. The applicant seems to have overlooked the fact that he was accorded an opportunity to appeal or make representation to the Minister within 14 days of him being arrested and detained. As far as the appellant's constitutional rights are concerned, art 5(4) is relevant. It reads:

> Where a person is arrested and not released he shall without unreasonable delay and in any case within twenty four hours (excluding the time of any necessary journey) be produced before a Magistrate and shall not be further detained in custody without the Magistrate's authority: *Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence and all provisions of all Clause shall be deemed to have been an integral part of this Article as from Merdeka Day*. (Emphasis mine.)

[45] Accordingly, I find nothing in the point taken.

LACK OF AUTHORITY TO INFORM

[46] The applicant next complained that the person who informed him about the said order of 21 May 2004, namely, Mohd Andri Bin Md Ridzwan had no authority or power to do so and therefore his restriction of residence to Bachok, Kelantan was unlawful. It was the contention of the applicant that under s 3 of the RRA, only the officer-in-charge of the prison was authorised to inform him about the contents of the said order of 21 May 2004 and its terms.

[47] Strictly speaking I should not address this complaint of the applicant as it was not a ground upon which he had applied for leave to bring this application. Be that as it may, I find this to be frivolous ground, without any merit at all. The officer-in-charge of the Kuching Central Prison at the material time was one Mohd Sakeri bin Haji Dollah and in his affidavit he states that on 21 May 2004, he was away from his office as he was attending a 'Mesyuarat Ketua-Ketua Institusi Penjara Sarawak' at prison headquarters, when he received a telephone call at or about 4pm from Mohd Andri regarding the said order. On being so informed he instructed Mohd Andri, as the next most senior prison officer and his deputy, to execute the said order. I find that what Mohd Sakeri and Mohd Andri had done on the day in question was in accordance with reg 233 of the Prison Regulation 2000 which states:

> The charge of prison shall, in the absence of the officer-in-charge, devolve on the next most senior prison officer and such officer, shall be competent to perform any duty required to be performed by the officer-in-charge.

[48] As the officer-in-charge of Kuching Prison, it would have been Mohd Sakeri's duty to inform the applicant of the terms of the said order as required of him by s 3(1) of the RRA but in his absence, Mohd Andri was clearly competent to do so as provided by reg 233. Accordingly, I reject the contention of the applicant.

INORDINATE DELAY

[49] I next turn to consider the complaint of the applicant that the said order was unlawful as there was inordinate delay on the part of the Deputy Minister of Internal Security Malaysia in issuing it. The evidence shows that the applicant was arrested and put into detention on 15 April 2004. It was only on 21 May 2004 that the Deputy Minister issued the said order of restricted residence. According to the applicant, this delay of some 36 days was fatal to the respondent's case as it rendered the said order unlawful. It was the contention of the applicant that since s 2 of the RRA does not prescribe any time frame for the issuance of an order of restricted residence by the Deputy Minister, it must, in accordance with s 54(2) of the Interpretation Act 1948, be issued with convenient speed. According to the counsel for the applicant, a period of 36 days cannot be regarded as convenient speed. Counsel for the respondent referred me to four cases in which it was held that the delay in issuing the order of restrict residence was inordinate and fatal. These cases were:

(a) *Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia v Liau Nyun Fui* [1991] 1 MLJ 350 (Supreme Court case) where the delay was 42 days;

(b) *Zakaria bin Hussain v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [1994] MLJU 39 (High Court case) where the delay was 24 days;

(c) *Ng Chai Yang v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia* [1994] 2 MLJ 336 (High Court case) where the delay was 19 days;

(d) *Thor Kheng Chai v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia* [1994] MLJU 457 (High Court case) where the delay was 14 days.

[50] Pausing here for a moment, I should point out that these four cases also show that the question of delay must be decided on the facts of each particular case.

[51] In considering this issue, I have for my guidance the Supreme Court decision in *Phua Heng Lai & Ors v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [1990] 1 CLJ (Rep) 238, which was also a case concerning the Restricted Residence Enactment. In that case, Hashim Yeop Sani CJ Malaya had this to say about the time limit for doing something where the law requiring that act to be done does not give a time frame for doing it:

(1) Section 3 of the Restricted Residence Enactment provides for the implementation of an order made under s 2(ii) of the Enactment. Under s 3(i), there is no time frame given for the implementation of such an order. Since time is not prescribed, then according to s38 of the Interpretation and general Clauses Ordinance 1948, which is similar to s 54(2) of the Interpretation Act 1967 anything which shall be done shall be done with all convenience speed.

[52] The learned Chief Justice also went on to say how the court should approach the question of delay. This is what the learned judge said at p 240:

> Whoever caused the delay must explain the delay; and it is for the court to decide whether the delay is reasonable under the circumstances.

[53] Keeping in mind what was stated in *Phua Heng Lai*'s case I now consider the question of delay in this case.

[54] Here, the day complained of was that of the Deputy Minister of Internal Security, Malaysia in issuing the said order. The Deputy Minister has explained in his affidavit that the delay was occasioned because he had to look into, examine and evaluate all relevant documents and case files in relation to this matter; that he had to decide whether to have an inquiry or otherwise; that he had to consider any appeal if filed by the applicant; and that he had to ensure all conditions and terms imposed on the applicant were fit and proper.

[55] Before considering whether the delay in this case is reasonable in the circumstances, I first wish to address the length of the delay involved. Although the applicant says there was a delay of 36 days between the date of his arrest and the issue of the order of 21 May 2004, in my judgment the first 14 days after the date of the applicant's arrest should not be taken into account when calculating the period of delay because the Deputy Minister must necessarily wait for 14 days to see if the applicant wishes to exercise his right to appeal or make representation against his arrest and detention to the Minister. Accordingly the period of delay in this case was really some 22 days. Given the fact that the Deputy Minister who issued the said order of 21 May 2004 was not the same Deputy Minister who issued the said warrant of arrest and detention, I find that Dato' Noh bin Haji Omar's explanation about what he needed to do before he issued the said order of 21 May 2004 is reasonable and acceptable in the circumstances. His explanation accords with the requirement of law that he should subjectively satisfy himself of the need to issue the order against the applicant. His explanation also shows that he did not act mechanically, contrary to what the applicant alleges. In my judgment the delay of 22 days to issue the said order of 21 May 2004 was reasonable under the circumstances disclosed and cannot be considered as inordinate.

BREACHES OF THE SAID ORDER

[56] It was the applicant's final contention that he should be released from restricted residence as there were breaches of the terms and conditions

mentioned in the said order, in that, once the officer-in-charge of the Kuching Prison had served him with the order of restricted residence and handed him over to the police officer who was tasked with escorting him to his place of restricted residence at Bachok, he should have been immediately put in a flight and taken to Kelantan. The applicant complained that instead, he was taken on 21 May 2004 from the Kuching Prison to the Central Police Station in Kuching and put into the lockup, and that it was only in the early morning of 22 May 2004 that he was handcuffed and put on a flight to Kelantan. The applicant also complains that he should not have been handcutfed while being transported to Kelantan.

[57] I regret that I see nothing in the point taken by the applicant. The affidavit of Mohd Andri shows that it was some time after 4pm on 21 May 2004 when the applicant was released from Kuching Prison. The affidavit of ASP Sarifuddin bin Mustapha, the officer tasked with escorting him to Kelantan, shows that at 5.30am on 22 May 2004 the applicant was put on a flight to Kelantan. ASP Sarifiiddin explained that in between that time, the applicant was kept in the lockup at the Central Police Station Kuching for administration, procedures, documentation and security reasons. ASP Sarifuddin also says that the applicant was handcuffed during his journey for security reasons.

[58] Keeping in mind that by s 3(ii) of the RRA, the applicant is required to be taken to his place of restriction 'as soon as may be after action has been taken under sub-s (i)', and that in the case of *Phua Heng Lai* the Supreme Court held that the words 'as soon as may be' means as nearly as may be reasonable in the circumstances of the case, I do not regard the police taking some 13 hours to get its procedures and documentation in order before putting the applicant on a flight to Kelantan as a breach of the order of 21 May 2004. Neither do I regard the placing of the applicant in a police cell and being handcuffed for security reasons as a breach of that order.

[59] In the result, I dismiss the applicant's application with costs to the respondents.

Application dismissed with costs.

Reported by Izzaty Izzuddin